



**Bernstein, Shur,
Sawyer & Nelson, P.A.**
Jefferson Mill Building
670 North Commercial Street
Suite 108
PO Box 1120
Manchester, NH 03105-1120

T (603) 623-8700
F (603) 623-7775

Roy W. Tilsley, Jr.
Shareholder
603-665-8823 direct
rtilsley@bernsteinshur.com

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Via Hand-Delivery and Email (pcd@manchesternh.gov)

Zoning Board of Adjustment
City of Manchester
1 City Hall Plaza
Manchester, NH 03101

**Re: Motion for Rehearing Pursuant to NH RSA 677:2
My Way Realty, LLC
55 Edward J. Roy Drive (Tax Map 645, Lot 34B)
Case # ZBA2023-011**

Dear: Chairwoman Ketterer and Members of the Board:

As you are aware, this office represents My Way Realty, LLC, the Applicant in the above-captioned matter. On April 13, 2023, the Zoning Board voted 3-2 to deny the Applicant's request for a Special Exception under Section 5.10(G)6 of the City's zoning ordinance to permit drive-through service at the previously permitted gas station and convenience store with take-out food items being constructed on site at 55 Edward J. Roy Drive. It is our contention that the Applicant proved all the criteria necessary to grant the Special Exception and we hereby request a rehearing.

The redevelopment of 55 Edward J. Roy Drive was permitted prior to the Covid-19 pandemic. A certain amount of traffic generation was contemplated throughout the Planning Board permitting process; however, following the pandemic, the Applicant has well-founded concerns that customer preference has changed and fewer people will utilize the store if their only option is to park and enter. To reach the level of customer traffic that was expected during initial site plan review—and to achieve economic sustainability at the site in a post-Covid world—the site requires drive-through access.

During the course of the public hearing, members of the Board raised concerns about traffic generation to and from the site, the appropriateness of the site for the requested use, and the effects of noise and vehicle exhaust on neighboring residences. A significant portion of the Board's questions related to the existing traffic in the densely populated neighborhood and the potential effects of the addition of a drive-through. To address the Board's concerns regarding traffic generation and density, the Applicant, relying upon the Institute of Transportation

Engineers Traffic Engineering Handbook (“ITE Handbook”)—the industry standard for modeling traffic engineering—provided the Board with expected trip generation numbers. Notwithstanding the information provided, the Board relied on its members’ opinions regarding traffic generation and denied the Applicant’s request. One Board member questioned the use of the 2021 ITE Handbook, noting that it does not reflect traffic patterns post-pandemic. While it is true that an updated version might better reflect modern traffic realities, the Applicant relied on the most current publication. It would be unreasonable and impractical for the Applicant to privately conduct traffic studies of similar uses to provide updated and localized data.

As reflected in its Notice of Decision dated April 19, 2023, the Board noted the following Special Exception criteria had not been satisfied:

2. “The requested use will not create undue traffic, congestion or unduly impair pedestrian safety;”

On behalf of the Applicant, we contend that sufficient information was provided to make this determination. Nevertheless, at a rehearing, Steven B. Keach, P.E.; President of Keach Nordstrom Associates, Inc. will present site specific information regarding traffic and pedestrian safety.

6. “The requested use will not create hazards to the health, safety or general welfare of the public, nor be detrimental to the character of the adjacent neighborhood;”

Again, we contend sufficient information was provided, but at a rehearing, Laura M. Bonk, M.S., M.B.A.; Project Manager at RPF Environmental will present site specific information regarding noise and vehicle exhaust resulting from the addition of a drive-through.

7. “The proposed location is appropriate for the requested use.”

The use is allowed in the B-1 Zone with a Special Exception. Through the additional testimony of the above-referenced experts, the Applicant will demonstrate the sufficiency of the lot for the proposed drive-through use.

To the extent the Board feels that the drive-through proposal would create undue traffic, congestion, or excessive noise, or unduly impair pedestrian safety, the Applicant contends that the site was designed for this use, including the possible addition of the drive-through. The Applicant is cognizant of the existing traffic levels in the area, due in large part to the number of residential units in the general proximity. As demonstrated by the ITE Handbook, the addition of the drive-through should not significantly increase traffic to this commercial site beyond the levels for which the site was originally permitted.

Insofar as the Board felt the industry standard traffic information published in the ITE Handbook was insufficient, the Applicant’s counsel expressed a willingness to provide additional site-specific information in response to the Board’s concerns, as noted above. On behalf of my client, I stated that the Board’s concerns were “easily addressable” with additional information; however, the Chair elected to proceed with a motion on findings rather than allow the Applicant’s team an opportunity to elaborate.

Similarly, the Board's finding that the addition of a drive-through will create a detrimental level of noise and exhaust is unreasonable. The evidence from the ITE Handbook regarding the number of cars on site was summarily dismissed by the Board. The Applicant presented evidence that granting the Special Exception would not greatly increase vehicle trips, and therefore the noise and exhaust should similarly not greatly increase. Furthermore, the idea that this site would be noticeably louder, including increased noise from the drive-through speakers, and create more pollution than the abutting busy roadways, was entirely speculative and unsubstantiated and will be thoroughly discussed at a rehearing. Manchester has a specific and strict noise ordinance— Chapter 94: "Noise Regulations" of the City of Manchester Code of Ordinances—which the drive-through will be required to comply with. The drive-through speaker will be adjustable and will be set to or below the levels dictated by § 94.10 "Noise Levels" and Table A "Maximum Allowable Noise Levels (in dBA) with Time of Day Allowance."

The Board's determination that the site is not suitable for the proposed use is contradicted by the City zoning map and the additional permits previously granted. 55 Edward J. Roy Drive is zoned Business Neighborhood (B-1). Despite the neighboring residential zone, the proposed drive-through is a reasonable use in the zoning district and can satisfy the required findings for a Special Exception. Of note, while not binding on the Board, the Board has granted multiple Variances for drive-throughs in locations abutting existing neighborhoods. As the Board is no doubt aware, the Variance standard is much stricter than that of the Special Permit the Applicant sought. For example, on November 10, 2021, this Board unanimously approved a variance for a drive-through coffee shop with exterior speaker at 525 Hooksett Road. That lot is partially within the R-1B zoning district, and the property boundary directly abuts the residential neighborhood on Oak Street. At 525 Hooksett Road, the approved drive-through speaker location is roughly 170 feet from the rear property line abutting residences, whereas the Applicant's proposed speaker location is approximately 208 feet from the property line closest to the residential condominium. A site plan depicting this distance at 55 Edward J. Roy Drive is included herewith. If 170 feet is an adequate distance for the granting of a variance for a drive-through, 208 feet should be sufficient in a commercial zone where drive-throughs are permitted via special exception.

As mentioned above, to help augment the information provided at the public hearing, the Applicant has engaged Keach Nordstrom and RPF Environmental. It is our hope that the Board will grant rehearing to consider this additional expert testimony.

In light of the reasons set forth herein, the applicant requests that the Board schedule a rehearing to consider the merits of the Applicant's amended proposal.

Sincerely,



Roy W. Tilsley, Jr.

Enclosure

